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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. [redacted] 49

DOROTHY BAILEY, *Petitioner*,

v.

SETH W. RICHARDSON, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Dorothy Bailey, petitioner herein, by her attorneys, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia entered on March 22, 1950 which reversed in part, affirmed in part and remanded with instructions a judgment entered on August 2, 1949.

OPINIONS BELOW

The opinions of the Court of Appeals, i.e., the majority opinion of Judge Prettyman and the dissenting opinion of Judge Edgerton (R. 114) have not yet been officially reported. The oral opinion of the District Court (R. 107-111) has not been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1950. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254 (formerly §§ 239 and 240 of the Judicial Code).

QUESTIONS PRESENTED

I. Whether a person may be adjudged ineligible for government service and dismissed from a non-security sensitive position, by administrative proceedings before a loyalty board, because of doubt as to her loyalty, (1) where there is no evidence against her whatever, (2) where the only evidence presented consists of a conclusive showing in her favor, and (3) where the only basis for the determination against her is secret information obtained from confidential informants whose identities are unknown to the court, the employee or the loyalty board making the decision.

The above question involves the following subsidiary questions:

a. Whether such administrative proceedings are consistent with the Constitution and in particular with the First, Fifth and Sixth Amendments.

b. Whether such administrative proceedings are consistent with the Executive Order under which they were held which provides for "maximum protection" to the government and "equal protection" to employees against "unfounded accusations of disloyalty" and which further provides that the findings must be on "all the evidence."

c. Whether an executive order purporting to authorize the determination of ineligibility for government service generally without regard to the nature of the position by administrative finding of a reasonable doubt as to loyalty is authorized by law or is valid under the Constitution.

STATUTES AND REGULATIONS INVOLVED

Executive Order 9835 (the so-called Loyalty Order), 12 F. R. 1935, March 12, 1947, is set forth in the Appendix, *infra*, at pp. 30 to 34.

STATEMENT OF THE CASE.

A. Petitioner.

Petitioner, Dorothy Bailey, has been in the government service almost continuously since November 1933. None of the positions which she held were in any sense secret or sensitive. (R. 34) She was engaged in helping Employment Services of the various States in training their personnel. Her work was based on a public document issued by the United States Employment Service and the training programs she developed were also available to the public in public libraries. (R. 34) She never had access to any secret information of any kind nor was her service in training employees connected with any security sensitive agency.

Petitioner had received Civil Service status in 1940. (R. 4, 70) In June 1947 due to a drastic reduction in force in the USES, petitioner was separated from the payroll. On March 25, 1948, she was reinstated to her old position as staff training supervisor in the USES. On May 28, 1948, she was advised that her reinstatement as a classified civil service employee was made permanent. (R. 4, 18, 19)

Petitioner's service in the United States government has been consistently good and she is recognized throughout the country as an expert in the specialized field of staff training. Her efficiency ratings were uniformly high. (R. 4, 32, 71)

B. The Loyalty Proceedings.

On the 31st day of July, 1948, some two months after her reinstatement was made permanent, petitioner received an interrogatory from the United States Civil Service Commission requesting certain information purporting to be relevant to her employment with the United States government. On August 9 petitioner, under oath, answered the interrogatories which raised questions as to her membership in and her association with various organizations. No formal charges were at any time served upon her. (R. 5, 20-25, 71, 72)

On September 13, 1948, pursuant to notice, she appeared before a Board of the Fourth Civil Service Region. The Board stated that it was inquiring whether "reasonable grounds exist for the belief that the person involved is disloyal to the government of the United States", a standard set forth by Executive Order 9835, 12 F. R. 1935, March 21st, 1947, the so-called Loyalty Order. (R. 5, 72) At the said purported hearing no persons appeared to testify against Miss Bailey. (R. 72) She was asked questions which stated or indicated that the Civil Service Commission had information that she had been a member of or affiliated with the Communist Party. (R. 6, 74)[1] She denied these charges specifically, affirmatively and circumstantially and refuted all implications to this effect. (See Loyalty Board Hearing (L. B.) 15-19, and *passim*)[2]

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[1] There was some question about two other organizations. One of these was the American League for Peace and Democracy with which Miss Bailey had a brief and casual connection (R. 23, 24). With the other, the Washington Committee for Democratic Action, she stated she had no connection whatever (R. 24). Very little attention was paid to these allegations in the hearings and they were apparently of no concern to the Loyalty Review Board.

[2] Transcripts of the hearing and of the later hearing before the Loyalty Review Board are in the Record. These parts of the Record have not been printed but are being supplied to the Court in mimeographed form as they were to the court below. The Loyalty Board hearing will be cited as L. B., the Review Board Hearing as L. R. B., certain compiled affidavits as Aff., and a Personal History Statement as P. H.

Petitioner was examined at great length during the hearing and on a number of subjects having little or no relation to the questions appearing on the interrogatories. In addition to petitioner's specific denials that she had any relationship or sympathy with the Communist Party or any activities which are in any way connected with the Communist Party or with Communism, petitioner denied affiliation with any organization that advocated the overthrow of the government of the United States. (L. B. 14) No person appeared to testify against her. (R. 7, 75)

The allegations of membership or affiliation with the Communist Party were of most general and indefinite form. They were not detailed. They had no reference to times, places or dates and were in substance blanket generalized allegations. (L. B. 15-19) The informants against her were not identified directly or indirectly and it appeared later that even the Board members had no knowledge of who the informants were. (L. R. B. 11)

Petitioner produced in her behalf witnesses who testified affirmatively as to her loyalty. The Minister of the Metropolitan Memorial Methodist Church of Washington, D. C., appeared. (L. B. 106, 107) Various officials of the USES appeared. (L. B. 48, 107, 114). In addition, affidavits were submitted by persons who could not be present but who were prominent in business and who knew Miss Bailey. (Aff. 1, et seq.) (R. 5, 73) The record made before the Panel consisted entirely of petitioner's testimony and the testimony of others favorable to her without a single syllable of evidence to the contrary. (L. B.)

Statements were made by the Examiner of the Board and by the Board members that secret files not available to Miss Bailey contained allegations that investigating agencies of the government had received information from informants in some cases believed to be reliable, which information was contrary to her testimony and the testimony of the witnesses who appeared in her behalf. The persons who supplied this information did not supply it under oath (R. 7,

75); they were not identified to the petitioner or to the Board members. (L. R. B. 11, 72)

Nevertheless, on November 1, 1948 the Board advised Miss Bailey that " . . . it has been found that, on all the evidence, reasonable grounds exist for belief that you are disloyal to the Government of the United States.

"Your application for or eligibility from each of the examinations mentioned below has been cancelled[3] and you have been barred from civil service examinations in the Federal service for a period of three years from October 29, 1948. When the period of debarment has expired the Commission will, upon request, consider the removal of the bar." (R. 26)

Miss Bailey appealed to the Loyalty Review Board, and was heard on December 8, 1948. There, she again appeared and testified at length on her own behalf (L. R. B.) and presented an affidavit which clearly, specifically and in detail established that she could not have been guilty as alleged of membership in the Communist Party. (P. H.) Not only her own affidavit, but the affidavits of others were presented both as to her character and as to her public positions contrary to the position which any Communist could have taken. She submitted in her behalf some 60 affidavits which came from persons who knew her well. They came from 15 states and included bankers, corporation officials, federal officials, state officials, union members, former union members, etc. (Aff. See also R. 43-45) No one appeared against her. No persons purporting to have knowledge

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[3] At the foot of the letter was a list of civil service registers on which Miss Bailey's name appeared as eligible for appointment to government positions on the date of the Loyalty Board's letter and from which her name was being removed. They were as follows:

"Examinations: Training Specialist, CAF-11, 12, 13 (Central Office, Civil Service Commission).

Administrative Officer, CAF-11, 12, & 13.

"Attachment Training Specialist CAF-11, 12, 13 (Fourth Regional Office, Civil Service Commission)" (R. 27)

testified or even made a statement against Miss Bailey. (R. 9, 79)

Her affirmative case established that she had publicly and to the knowledge of a number of the affiants taken positions inconsistent with the charge of membership in or affiliation with the Communist Party. Thus it was clearly established not only by petitioner's testimony and her own affidavit (P. H. 7-10) but by the testimony of a number of other persons that she had favored the Marshall Plan, a position notoriously opposed to that of the Communist Party. (L. B. 53, 112, 113) (See e.g., Affs. Messrs. Limbert and McCarthy.)[4] In 1940 during the period of the Nazi-Soviet Pact, she had favored Lend-Lease and was very critical of the Soviet Union's position. (L. B. 54, 55, 112, 113, Aff. McGee) In her own union she had urged that the officers sign the non-Communist affidavit. (P. H. 9, Aff. Limbert) She had opposed in her union a foreign policy resolution which was widely publicized as being pro-Russian and had suggested another resolution which was the official CIO resolution on foreign policy at the time. (P. H. 9, Aff. Limbert)

In the face of this there was only secret information in the secret files given by persons not under oath and not known even to the members of the Loyalty Board. (L. R. B. 11, 72) At the hearing before the Loyalty Review Board (part of the record herein), the Chairman of the Panel made the following statement (L. R. B. 10, 11):

> "The charge developed in these interrogatories I don't understand is confined to a union. It is that she was a member of the Communist Party in the District of Columbia as early as 1935 and that in the early days of the War period she attended Communist Party meetings, and later when she became active in the Union

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[4] These affidavits are in unnumbered pages separated to show first the affidavits submitted to the lower board, then those submitted to the Review Board. Within these categories the affidavits are included in alphabetical order.

she continued her membership—that is the communistic membership. Again about 1936 she was a known member of the so-called closed group of the Communist Party operating in the District of Columbia, and was one of those responsible for establishing a minority group in the Central Labor Council. Again that Bailey was a member of the Communist Party and has been for seven or eight years.

* * *

" . . . That Miss Bailey is either a member of the Communist Party or is completely dominated and controlled by them to the extent she follows their policy and instructions and has been doing so for a period of some eight years. That Miss Bailey is considered a member, if not an actual member one who is entirely controlled by the Communist leaders in the District of Columbia. Then that constitutes, to paraphrase as I did it, the basis for the charge against Miss Bailey."

* * *

CHAIRMAN RICHARDSON:

"I can only say to you that five or six of the reports come from informants certified to us by the Federal Bureau of Investigation as experienced and entirely reliable.

MR. PORTER:

"We would like to have their names, and I would challenge any one of them to state it publicly in a non-privileged form.

CHAIRMAN RICHARDSON:

"I want to put it up to you in the light of which the Regional Board was considering it. It wasn't on the basis of union activity; it was on the basis of a communistic activity.

MR. PORTER:

"Mr. Chairman, would we be privileged to obtain at least this much information? Those informants which are judged reliable by the Federal Bureau of Investigation, have they been active in the Federal Workers Union activity?

CHAIRMAN RICHARDSON:

"I haven't the slightest knowledge as to who they were or how active they have been in anything."

At pages 71 and 72 (L. R. B.), the Chairman, referring to the statement of confidential informants, stated:

" . . . If this testimony is true, it is neither gossip nor malicious. We are under the difficulty of not being able to disclose this.

MR. PORTER:

"Is it under oath?

CHAIRMAN RICHARDSON:

"I don't think so."

The answer admits that the identity of informants was not disclosed "nor was the information given under oath". (R. 75) Nevertheless, that Board on February 9 wrote Miss Bailey stating that the Board had reached the conclusion that the evidence in the entire record was sufficient to sustain the finding and decision of the Fourth Regional Loyalty Board and that the Federal Security Agency had been asked to dismiss the plaintiff at once. It affirmed "the decision of ineligibility by the Fourth Regional Loyalty Board." (R. 63, 65) No statement of reasons was made other than the general allegation above.

Thereafter, Miss Bailey requested review by the full Loyalty Review Board rather than by a Panel and this was denied on March 18. (R. 11, 67, 81, 82)

C. Court Proceedings.

The present action was then commenced requesting a declaration that appellant was illegally dismissed and held ineligible for government service. Reinstatement and other relief was requested. (R. 15, 16) The defendants are the Federal Security Administrator, the members of the Loyalty Board and Review Board Panels and the Civil Service Commissioners. (R. 3) By reason of a subsequent transfer of the functions of the USES to

the Department of Labor, the Secretary of Labor was added as a party. (R. 148) Cross motions for summary judgment were filed by appellant and appellees. (R. 104, 107) The District Court (per Holtzoff, J.) denied the appellant's motion for summary judgment and granted the motion of appellees for summary judgment. (R. 107-111)

The Court of Appeals by a 2-1 vote sustained the dismissal of petitioner and the finding making her ineligible for government service. It reversed only the provision of the order of the Civil Service Loyalty Board barring her from competing in civil service examinations for three years on the ground that such a bar was punishment which could not constitutionally be imposed without evidence in the legal sense as distinguished from secret "information." The Court of Appeals remanded the case for the entry of the decree "holding invalid those sections of the orders of the Loyalty Boards and the Federal Security Agency which would bar Miss Bailey from employment for three years, and holding valid those sections which accomplished her removal from the rolls and from office in the classified civil service." (R. 136) This mandate has been stayed pending the disposition of this petition.

Judge Edgerton in a dissenting opinion (R. 136) held that the dismissal was illegal because (1) the Executive Order required that the finding of ineligibility must be "on all the evidence" and therefore could not be made upon secret information; (2) any dismissal for disloyalty and declaration of ineligibility for federal employment is a punishment requiring the safeguards of a judicial trial; and (3) the dismissal and adjudication of ineligibility in this case abridged freedom of speech and assembly.

REASONS FOR GRANTING THE WRIT.

The issues presented by this case raise questions of fundamental importance to the Government of the United States and our democratic society. The decision of the court below removes from the government service an em-

ployee in a technical position not involving the making of policy or any access to information affecting the national security. It stigmatizes her as disloyal and rates her as ineligible for any government employment without a scintilla of evidence, on the basis of secret reports of persons unknown to the Loyalty Board, to the courts, or to her. The decision makes it completely impossible for her to find the type of employment for which she is specially equipped and trained. (R. 35) The decision will make it exceedingly difficult if not impossible for her to find other employment outside the Government. This is because in applying for employment she will normally be obliged to state the reasons for her severance from Government employment, which reasons are akin to treason. Private employers might even fear that if they employed her, they themselves would be suspected by their government.

The decision constitutes a continuing threat to thousands of loyal Government employees that they, too, may find their careers ruined by informants whose identity and charges will never be known to them. As Judge Edgerton stated: "However respectable her anonymous accusers may have been, if her dismissal is sustained the livelihood and reputation of any civil servant today and perhaps of any American tomorrow are at the mercy not only of an innocently mistaken informer but also of a malicious or demented one unless his defect is apparent to the agent who interviews him." (R. 138)

1. We respectfully urge this Court to take note of the fact that the action of the Loyalty Board not only directs the dismissal of the petitioner from her present position but declares her to be ineligible for employment in the Federal Government. It is impossible in light of the record to regard this case as a mere dismissal by the Government because of the unsuitability of the petitioner for the particular position she held. The Loyalty Board was not considering the suitability of the petitioner for any particular position. As we have pointed out, her work did not involve

the making of policy nor did it give her access to any information affecting the security or safety of the nation. The Loyalty Board did not question her competence or ability to perform her job, nor did it consider any possible danger or disadvantage to the Government in her continuing in that job. Rather, the Loyalty Board, disregarding her record of long and faithful service to her government, was determining whether the unevaluated and uncorroborated files of the secret police disclosed any reasonable ground for doubting her loyalty to the United States. In so finding they determined that she was ineligible to hold any position however lowly or non-sensitive in the United States Government. This was done without disclosing to her the information on which they acted and without giving her the right to confront and cross-examine those who privately denounced her.

By striking out the provision barring the petitioner from competing in civil service examinations for three years the court below did not change the character of the order which clearly and explicitly found her ineligible for employment in the Government service and provided her no means, now or in the future, for removing from her record that stigma of ineligibility on grounds of disloyalty.

The action of the Loyalty Board is therefore in effect an adjudication which stigmatizes and punishes the petitioner no less than would a conviction for an infamous crime. Such action is in direct conflict with the principles enunciated by this Court in the *Lovett* case. *United States* v. *Lovett*, 328 U. S. 303.

This adjudication was made without any of the safeguards of due process. It is justified by the court below only on account of the public interest in combating communism even to the extent of using methods which violate the spirit and letter of the Bill of Rights.

Whether there is such a condition of peril and insecurity within the Government of the United States as to justify the sweeping suspension of our traditional methods of fair

trial for employees whose work does not affect the security of the United States is a question of such overwhelming public significance as to require the Court to grant certiorari in this case.

2. We also respectfully direct the Court's attention to the fact that the decision of the court below construes words in the Presidential Loyalty Order which were designed for the protection of Government employees as a weapon to deprive such employees of any protection against unfounded charges of disloyalty. The preamble of the order reads as follows:

> "*Whereas maximum protection must be afforded the United States* against infiltration of disloyal persons into the ranks of its employees, *and equal protection from unfounded accusations of disloyalty* must be afforded the loyal employees of the Government." [Emphasis supplied.]

Carrying out the intent of the preamble, the order itself purported to provide at least a fair administrative hearing. In Part V, under the heading "Standards," the order reads:

> "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, *on all the evidence*, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." [Emphasis supplied.]

In interpreting the meaning of the words "maximum protection" of the Government, "equal protection" to the employee, and the words "all the evidence", the court below said that a finding of disloyalty could be sustained if the only so-called "evidence" to support it was secret information not under oath supplied to the Department of Justice by informants unknown even to the Loyalty Board. It is obvious that the Loyalty Board itself was not in a position to weigh the reliability of information given by

informants unknown to it. Neither the secret police nor their informants appeared before the Loyalty Board. The Board accepted without question the unexplained opinion contained in the FBI report that these informants were reliable and thereby delegated its quasi-judicial function to the secret police.

In approving this procedure the court below has sanctioned the identical process by which Dreyfus was convicted in 1894. It will be recalled that the French tribunal acted on a sealed envelope handed it by the French Ministry of Justice and that in 1899 the French Court of Cassation repudiated that procedure and re-opened the case. *The Dreyfus Case* by Alfred Dreyfus and Pierre Dreyfus, Yale University Press, 1937.

But there is a precedent even more pertinent than the Dreyfus case. The decision of the court below is in direct conflict with the decision of another presidential tribunal which gave prison sentences to German judges who used the same kind of evidence to convict German nationals. We quote the relevant portions of the opinion of the presidential tribunal sitting at Nuremberg.

> "The final degradation of the judiciary is disclosed in a secret communication by Ministerial Director Letz of the Reich Ministry of Justice to Dr. Vollmer, also a Ministerial Director in the Department. Not only were the judges 'guided' and at times coerced; they were spied upon. We quote:
>
> > 'Moreover, I know from documents, which the Minister produces from time to time out of his private files, that the Security Service takes up special problems of the administration of justice with thoroughness and makes summarized situation reports about them. As far as I am informed, a member of the Security Service is attached to each judicial authority. This member is obliged to give information under the seal of secrecy. This procedure is secret and the person who gives the information is not named. In this way we get, so to say, anonymous reports. Reason given for this procedure are of State political

> interest. As long as the direct interests of the State security are concerned, nothing can be said against it, especially in wartime.'
>
> "In view of the conclusive proof of the sinister influences which were in constant interplay between Hitler, his Ministers, the Ministry of Justice, the Party, the Gestapo, and the courts, we see no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity." *United States* v. *Joseph Alstoetter.*[5]

We can see no distinction between this case and the Nuremberg case excepting that the German judges had imposed penalties involving death and imprisonment on secret information. The penalty imposed by the Board here involves the indelible stigma of disloyalty and the loss of livelihood and the respect of one's fellow citizens. But we suggest that such a distinction has no validity as a basis for construing what the President meant by the phrases "maximum protection" of the Government and "equal protection" to the employee against "unfounded accusations of disloyalty" and by the requirement that the findings with respect to disloyalty must be "on all the evidence".

This conflict in principle between the President's tribunal at Nurenberg and the President's Loyalty Board sitting in Washington presents an issue of such public importance that it should be resolved by this Court.

3. The construction given the order of the court below is not only inconsistent with the principles of fair procedure which the United States announced to the world at Nuremberg, it also makes a mockery of the President's declaration in his Executive Order assuring Government employees "protection" against "unfounded accusations of disloyalty". The President set up a procedure of hearings on appeal which, on their face, purported to provide at least a fair administrative hearing. The court below interprets

[5] The record is available at the Library of Congress.

them to mean that the employee has no protection whatever and that even the reviewing courts cannot question the certificate of a police agency as to what weight they should give the secret information. The so-called "hearings" and "appeals" mean under the construction of the court below only that the employee may talk without knowing the information against him and without being given any real guide or clue as to how he may meet it. The court below is saying that when the President said that the employee was to retain the equal of "maximum protection" he did not mean maximum protection; that when he said "evidence" he did not mean evidence; that when he said "hearing" he did not mean hearing in the traditional American sense.

This construction of the presidential order in our view impairs the good faith and integrity of the President's announced purpose in adopting the order. It presents to this Court a question of paramount public importance,—the question whether or not the President's promise of fair treatment to employees should be honored by the Court in interpreting his order.

CONCLUSION.

This case in no sense involves the right of the Federal Government to refuse employment to a person in an important policy or security sensitive position because in the opinion of the appointing authority such person does not possess the outstanding qualities of reliability and public confidence which should be required of one in such a position. This case involves only the question of the right of the Government to determine that a person is ineligible for *any* employment in the Government regardless of its relation to the security or safety of the nation by an administrative procedure which does not disclose the information on which the Government acts and provides no opportunity of cross-examination. To meet Congressional requirements government employees are required to take an oath that

they do not advocate or belong to any organization which advocates the overthrow of the government. For false swearing a government employee may be indicted and punished in accordance with the traditional judicial process (*Marzani* v. *United States*, 168 F. 2d 133 (App. D. C., 1948), aff'd 335 U. S. 895; 336 U. S. 922). The national security does not require or justify the use of star chamber methods to enforce these requirements, certainly not in relation to government employment which involves no clear or present danger to the national security.

These are the reasons of paramount public importance which in our view require the granting of certiorari.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION.

We rely on the able and exhaustive opinion of Mr. Justice Edgerton, dissenting, as our brief in support of petition for writ of certiorari.

EDGERTON, Circuit Judge, *dissenting:* Without trial by jury, without evidence, and without even being allowed to confront her accusers or to know their identity, a citizen of the United States has been found disloyal to the government of the United States.[1]

For her supposed disloyal thoughts she has been punished by dismissal from a wholly nonsensitive position in which her efficiency rating was high. The case received nation-wide publicity. Ostracism inevitably followed. A finding of disloyalty is closely akin to a finding of treason. The public hardly distinguishes between the two.

No charges were served on appellant. The chairman of the Regional Board said "Nobody has presented any charges." The Board told appellant it was inquiring whether there were reasonable grounds for believing she was disloyal to the government of the United States. The Federal Bureau of Investigation had reported that informants believed to be reliable had made general statements purporting to connect her with the Communist Party. These reports were not disclosed to the appellant and have not been disclosed in court. The informants were not identified to the appellant or even to the Board. Their statements were admittedly not made under oath. The appellant denied under oath any membership in and any relationship or sympathy with the Communist Party, any activities connected with it or with communism, and any affiliation with any organization that advocated overthrow of the government of the United States. She asserted her loyalty to the government of the United States. She admitted attending one Communist meeting in 1932 in connection with a seminar study of the platforms of the various parties while she was a student at Bryn Mawr.

Appellant had no power to subpoena witnesses. Though it takes courage to appear as a voluntary defense witness in a loyalty case, four appeared. One was the pastor of the Methodist church of which appellant is an active member. He testified: "When this charge or information came to me I was not only surprised, I was dumfounded. . . . People in our community and in our church think of her and her family in the highest terms." Three officials of appellant's government agency, the United States Employment Service, who had

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[1] The form of the finding against the appellant is that "reasonable grounds exist for belief" that she is disloyal to the government of the United States. The only important difference between this finding and a direct adjudication of disloyalty is that the former finding is easier to make. Once made, there is no practical difference. Executive Order 9835 recognizes this. In Part I, 2a it describes the form of finding prescribed in the Order and made here as an "adjudication of disloyalty"; in Part V, 2 as a "determination of disloyalty".

known appellant professionally and socially for years, testified respectively that they were "extremely shocked" by the suggestion of her being disloyal, that it was "inconceivable" and "out of reason". Persons prominent in business, government and education who knew appellant but could not be present submitted affidavits.

No witness offered evidence, even hearsay evidence, against appellant. No affidavits were introduced against her. The record consists entirely of evidence in her favor. Yet the Board purported to find "on all the evidence" that there were reasonable grounds for believing she was disloyal to the government of the United States. Appellees admit the Board made this finding "after considering all the evidence, including the confidential reports of the Federal Bureau of Investigation." The Board directed the Federal Security Agency to suspend appellant pending her appeal to the Loyalty Review Board, and told her she was barred from civil service examinations for three years.

Appellant appeared and testified before a panel of the Loyalty Review Board. She submitted her own affidavit and the affidavits of some 70 persons who knew her, including bankers, corporate officials, federal and state officials, union members, and others. Again no one testified against her. She proved she had publicly and to the knowledge of a number of the affiants taken positions inconsistent with Communist sympathies. She showed not only by her own testimony but by that of other persons that she favored the Marshall Plan, which the Communist Party notoriously opposed, and that in 1940, during the Nazi-Soviet Pact, she favored Lend-Lease and was very critical of the Soviet position. In her union she urged its officers to execute non-communist affidavits, opposed a foreign policy resolution widely publicized as pro-Russian, and favored what was then the official CIO resolution on foreign policy.

Against all this, there were only the unsworn reports in the secret files to the effect that unsworn statements of a general sort, purporting to connect appellant with Communism, had been made by unnamed persons. Some if not all of these statements did not purport to be based on knowledge, but only on belief. Appellant sought to learn the names of the informants or, if their names were confidential, then at least whether they had been active in appellant's union, in which there were factional quarrels. The Board did not furnish or even have this information. Chairman Richardson said: "I haven't the slightest knowledge as to who they were or how active they have been in anything." All that the Board knew or we know about the informants is that unidentified members of the Federal Bureau of Investigation, who did not appear before the Board, believed them to be reliable. To quote again from the record: "CHAIRMAN RICHARDSON: I can only say to you that five or six of the reports come from informants certified to us by the Federal Bureau of Investigation as experienced and entirely reliable." "MR. SEASONGOOD: Here is a statement that it was ascertained you were a member of the Communist Party in the District of Columbia as early as 1935, and that in the early days of her Party membership

she attended Communist Party meetings. . . . Here is another that says you were a member of the Communist Party, and he bases his statement on his knowledge of your association with known Communists for the past seven or eight years. That is part of the evidence that was submitted to us." "MR. PORTER: Is it under oath? CHAIRMAN RICHARDSON: I don't think so. MR. SEASONGOOD: It is a person of known responsibility who had proffered information concerning Communist activity in the District of Columbia. . . . Here is another one: 'considers appointee a member of the Communist Party, and if not an actual member, one who is entirely controlled by the wishes of the Communist Leaders in the District of Columbia.'"

On such material, the Review Board sustained the action of the Regional Board and directed the Federal Security Agency to dismiss the appellant. However respectable her anonymous accusers may have been, if her dismissal is sustained the livelihood and reputation of any civil servant today and perhaps of any American tomorrow are at the mercy not only of an innocently mistaken informer but also of a malicious or demented one unless his defect is apparent to the agent who interviews him.

Appellant's dismissal violates both the Constitution and the Executive Order.[2]

I. *Executive Order 9835*[3] *requires evidence and an opportunity for cross-examination.* The Executive Order provides that "The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States."[4] Despite the plain words "all the evidence", the court rules that the Order requires no evidence and authorizes findings based on unsworn confidential reports of unsworn statements of anonymous informants as to their beliefs concerning an employee's affiliations. I think the Order does no such thing.

The court derives its paradoxical conclusion from premises that do not support it. The court points out that the Order and a supplementary order require the names of confidential informants, and reports of the proceedings, to be kept confidential. But no order requires the Board to consider only confidential information. To say that confidential informants shall not be disclosed is not to say that willing government witnesses shall not be heard or that findings may be made without evidence. Neither is the prohibition

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[2] The Boards that dismissed the appellant are agencies of the Civil Service Commission. Before their proceedings took place, the appellant had been reinstated in her permanent position in the classified civil service from which she had previously been separated by a reduction in force. Therefore both the Lloyd-LaFollette Act, 37 Stat. 555, § 6, 5 U. S. C. § 652, and the Executive Order, Part I, 1 and Part II, preclude the Civil Service Commission, or any administrative agency other than the one in which she worked, from interfering with her tenure.

[3] 12 FED. REG. 1935.

[4] Part V, 1.

against publication of reports a prohibition against hearing witnesses. On the contrary, Executive Order 9835 expressly authorizes testimony by witnesses for the accused employee.[5] If anything so unprecedented as a prohibition of testimony by witnesses for the government had been intended it would have been plainly expressed. Unsworn anonymous statements may be used and useful as leads to evidence but not as substitutes for evidence.

The requirement of the Order that findings be based on evidence is not merely uncontradicted by the context. It is confirmed by the context. The preamble of the Order says that both the United States and the accused employee must be afforded "maximum protection."[6] Such protection plainly includes an opportunity to introduce witnesses and to cross-examine opposing witnesses. Even the minimum standards of fairness that are known as due process of law include as much. Hardly any protection at all is possible against vague assertions of unseen and unknown persons. The accused employee can only deny such assertions and prove, as the appellant did, that they are inconsistent with her reputation and with some of her acts. She can prove no specific contradictions, no mistaken identities, and no alibis, for she cannot discover just when and where she is supposed to have done or said anything. However prejudiced, mistaken, untruthful, delinquent, or defective her accusers might prove to be if they could be cross-examined, an unidentified agent's recorded belief in the reliability of their reports and inferences must go unchallenged. "The many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination. . . . It is beyond any doubt the greatest legal engine ever invented for the discovery of truth."[7]

Moreover the Order provides that "an officer or employee who is charged with being disloyal shall have a right to an administrative hearing . . ."[8] Particularly in the light of the guarantee of maximum protection, this must mean a full administrative hearing. Even a normal administrative hearing, to say nothing of one that affords maximum protection, includes the right of confrontation and cross-examination and the requirement that findings be based on evidence. Evidence has been required in administrative hearings even where, as here, the substantive matter at stake may be considered a privilege rather than a right. Aliens are entitled to a fair hearing in deportation proceedings, and this despite the fact that "there is no express requirement for any hearing or adjudication in the statute

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[5] Part II, 2a.

[6] "Whereas maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:"

[7] WIGMORE, EVIDENCE, §§ 1362, 1367, (3d ed. 1940).

[8] Part II, 2a.

authorizing deportation." [9] Even in deportation proceedings against aliens charged with advocating, or with membership in organizations advocating, overthrow of the government by force, evidence is required. The Supreme Court has said in such cases: "If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned is lacking, the proceeding is void and must be set aside." [10] "The ultimate question presented by this record . . . is whether the warrant of deportation was supported by any evidence that the alien when he entered the United States advocated opposition to all organized government or the overthrow of the United States government by force and violence . . ." [11] "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. . . . Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." [12] It follows that even if the Executive Order did not expressly require findings based on evidence, or promise maximum protection, the administrative hearing which the Order guarantees to the employee whose job and reputation are at stake would still require evidence and an opportunity for cross-examination. As the Supreme Court has said, "manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute." [13]

No doubt cases arise in which investigation of an employee produces only anonymous accusations. The Executive Order elects to preserve their anonymity. No one questions the validity of that election. But its effect is that the employee must be cleared or the proceedings dropped.[14] The Executive Order does not, and could not constitutionally, provide that he may be found disloyal without evidence.

II. *Dismissal for disloyalty is punishment and requires all the safeguards of a judicial trial.* Most dismissals, including among others dismissals for colorless or undisclosed reasons and dismissals for incompetence, are plainly not punitive. They do not require a judicial trial or even a full administrative hearing. They are within the authority of the executive. Likewise most tax laws are within the authority

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[9] *Wong Yang Sung* v. *Clark*, U. S. , decided Feb. 20, 1950; 18 L. W. 4166, 4171.

[10] *Kessler* v. *Strecker*, 307 U. S. 22, 34.

[11] *Vajtauer* v. *Comm'r of Immigration*, 273 U. S. 103, 106.

[12] *Bridges* v. *Wixon*, 326 U. S. 135, 154.

[13] *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U. S. 88, 93. The Massachusetts Supreme Court has quoted this statement in reviewing the dismissal of a school principal by a board of education. *Moran* v. *School Committee of Littleton*, 317 Mass. 591, 594-595, 59 N. E. 2d 279, 281.

[14] *Cf. United States* v. *Grayson*, 166 F. 2d 863, 870.

of the legislature. It does not follow that all legislative taxation is constitutional or that all executive dismissals are constitutional.

Punishment is infliction of harm, usually for wrong conduct but in appellant's case for wrong views. Dismissals to provide jobs for persons of certain affiliations, whatever else may be said of such dismissals, are not punitive. But dismissals for disloyal views are punitive. This is what the Supreme Court squarely held in the *Lovett* case.[15] It overruled no cases in so holding. The earlier decisions of the Supreme Court on which this court relies are irrelevant because they involved dismissals for undisclosed reasons, not for disloyal views.

The question whether the rule of the *Lovett* case extends to dismissals of "disloyal" persons from sensitive positions in which their presence might threaten substantial harm to the government does not arise in the present case and I express no opinion on it. Appellant was dismissed from a nonsensitive position. She was a staff training officer in the United States Employment Service. In the case of such an officer, no way is apparent and none has been suggested in which "suspicion of disloyalty indicates a risk" to the security of the United States. ***Appellant's dismissal for wrong views has nothing to do with protecting the security of the United States.***

Congress attempted to dismiss Lovett and two others from their government positions as of November 15, 1943, because of their supposed disloyal views. Their agencies kept them at work on their jobs for varying periods after November 15 but discontinued their salaries after that date. They sued for and recovered salaries for their post-November 15 work. The Supreme Court held that their dismissals for supposed disloyalty, "which stigmatized their reputation and seriously impaired their chance to earn a living,"[16] were equivalent to punishment for crime and therefore could not be imposed by Congress or without judicial trial. The validity of an incidental attempt of Congress to make them ineligible for possible future appointments was not the question before the Court. They did not ask for, and it does not even appear that they would have been willing to accept, either reinstatement in their old positions or appointments to new positions. The Court *said* "This permanent proscription from any opportunity to serve the government is punishment . . ."[17] But the question before the Court was whether the attempted dismissals were valid. This was the question the Court *decided*.

This court is deciding this case as if the Supreme Court had sustained the attempt of Congress to dismiss Lovett and the others, denied their claims to salaries, and awarded them nothing but an assurance that they would be eligible for possible future appointments if they were ever offered any that they cared to accept. This

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[15] *United States* v. *Lovett*, 328 U. S. 303.

[16] 328 U. S. at 314.

[17] 328 U. S. at 316.

court interprets the *words* of the Supreme Court regarding "permanent proscription" as contradicting and overruling the *decision* of the Supreme Court regarding dismissals. If the Court's words had been inconsistent with its decision our duty would of course have been to follow the decision, not the words. But they were not inconsistent. The dismissals that the Court held invalid were the immediate phase of the permanent proscription that the Court said was invalid.

The distinction this court draws between dismissal as punishment and ineligibility as punishment not only contradicts the *Lovett* case but has no basis in reason. Dismissal is more certainly damaging than ineligibility, for the necessary combination of vacancies, qualifications, and desire for public appointment may never occur again. A person dismissed as disloyal can obtain no normal employment, public or private. The President's Committee on Civil Rights said in 1947: "It is a severe punishment to be discharged from the government for disloyalty, as the Supreme Court pointed out in 1946 in *United States* v. *Lovett*. . . . Loss of job and inability to obtain another one is a severe punishment to impose on any man." [18] It makes no present or probable future difference to the appellant and it should make no difference to a court whether the appellant is told that she is separated from the civil service for life, for three years, or only for the moment. Whatever she is told, if her dismissal is sustained she will not be reemployed while the present climate of opinion continues.

Since dismissal from government service for disloyalty is punishment, due process of law requires that the accused employee be given all the safeguards of a judicial trial before it is imposed. The Supreme Court in the *Lovett* case did not stop with holding that *Congress* could not dismiss employees for disloyalty. It went on to say, with particular reference to this punishment: "Those who wrote our Constitution . . . intended to safeguard the people of this country from punishment without trial by duly constituted courts. . . . And even the courts to which this important function was entrusted were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, . . . he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him . . . and even after conviction no cruel and unusual punishment can be inflicted upon him." [19]

Not only the basic right to judicial trial but every one of these basic safeguards, unless it be the last, was violated here.[20] (1) The appellant was not tried by a jury. (2) She was not clearly informed of the charge against her. This is true not only because there was

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[18] *To Secure These Rights*, p. 51.

[19] 328 U. S. at 317-318.

[20] The Supreme Court named additional safeguards, including the right to counsel, which I have omitted from the quotation because they were not violated here.

no formal charge and, according to the Chairman of the Regional Board, no charge at all, but also because of the vagueness of the term "disloyal". It is so indefinite that neither the Executive Order nor, as far as appears, the Loyalty Review Board has attempted to define it. It means different and sometimes opposite things to different people. Since section 9A of the Hatch Act[21] forbids employment of members of an organization that advocates (and, by necessary implication, of persons who advocate) "the overthrow of our constitutional form of government in the United States," the Executive Order is plainly meant to cover more ground, but how much more no one can say. As the Supreme Court has repeatedly held, very indefinite standards cannot be used as a basis for punishment. (3) The appellant violated no law. (4) Even the Executive Order was issued after the activities from which her disloyalty is inferred took place, if they took place at all. (5) She was not confronted with any witnesses against her. (6) Forced idleness may well be considered a cruel as well as unusual punishment. It has been considered more severe than forced labor.

Because certain officials should be free from apprehension that personal harm to them may result from their official acts they cannot, as the court points out, be required to pay damages for their official errors. But that is irrelevant here. The present appellant asks compliance with the Constitution, not damages for its violation. "Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, . . . the courts have the power to grant relief against those actions."[22]

III. *Appellant's dismissal abridges freedom of speech and assembly.*[23] Mr. Justice Holmes' famous statement, made in 1892 when he was a member of the Supreme Judicial Court of Massachusetts, that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"[24] is greatly oversimplified. "As pointed out in Frost Trucking Co. v. Railroad Comm., 271 U. S. 583, 594, 46 S. Ct. 605, 607, 70 L. Ed. 1101, even in the granting of a privilege, the state 'may not impose conditions which require the relinquishment of constitutional rights . . .'"[25] including the rights of free speech, press, and assembly. In the *Esquire*

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[21] 53 Stat. 1148, 5 U. S. C. 118j.

[22] *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 704.

[23] Read literally, the First Amendment forbids only *Congress* to abridge these freedoms, but as the due process clause of the Fourteenth Amendment extends the prohibition to all state action the due process clause of the Fifth must extend it to all federal action. *Cf. United Public Workers* v. *Mitchell*, 330 U. S. 75, 94-95.

[24] *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N. E. 517.

[25] *Alston* v. *School Board of City of Norfolk*, 112 F. 2d 992, 997 (C. A. 4th). The court also cited *Union Pac. R. Co.* v. *Public Service Comm.*, 248 U. S. 67, 69, 70, and *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, 507. *Cf. Western Union Telg. Co.* v. *Kansas*, 216 U S. 1; *Terral* v. *Burke Construction Co.*, 257 U. S. 529.

case the Supreme Court said: "We may assume that Congress . . . need not open second-class mail to publications of all types. . . . But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 421-423, 430-432, 437-438. Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated." [26] Similarly, the premise that government employment is a privilege does not support the conclusion that it may be granted on condition that certain economic or political ideas not be entertained. Though members of minority parties have often been dismissed, in the past, to make room for members of a party in power, any comprehensive practice of that sort would today be unthinkable as well as illegal, and the Supreme Court has plainly indicated it would also be unconstitutional. The Court pointed out in the *Mitchell* case that Congress could not " 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' " [27]

The dismissal which the Court upheld in the *Mitchell* case was not based on views but on conduct. The Hatch Act sought to restrain civil servants, regardless of their views, from devoting more than a limited amount of energy to politics. The Court held that "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." [28] Since the present appellant was not a policy-making officer, had no access to state secrets, and was not even in a sensitive agency, it is doubtful whether any political opinions of hers, however obnoxious, could reasonably be deemed to interfere with the efficiency of the service. But the question is, I think, immaterial here, for the "vague and indeterminate . . . boundaries" [29] of the term "disloyal" have made the Executive Order as construed and applied a restraint on many opinions that certainly cannot be deemed to interfere with the efficiency of the service.

"In loyalty hearings the following questions have been asked of employees against whom charges have been brought. . . . 'Do you read a good many books?' 'What books do you read?' 'What magazines do you read?' 'What newspapers do you buy or subscribe to?' 'Do you think that Russian Communism is likely to succeed?' 'How do you explain the fact that you have an album of Paul Robeson records in your home?' 'Do you ever entertain Negroes in your home?' . . . 'Is it not true . . . that you lived next door to and

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[26] *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 155, 156.

[27] *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100.

[28] *Id.* at 101.

[29] *Herndon* v. *Lowry*, 301 U. S. 242, 264.

therefore were closely associated with a member of the I. W. W.?'"[30] "Too often the line of questioning has revolved around conformity with prevailing mores in personal habits and personal opinion. . . . A woman employee was accused of disloyalty because, at the time of siege of Stalingrad, she collected money for Russian war relief (she also collected money for British and French relief)."[31] A record filed in this court shows that an accused employee was taken to task for membership in Consumers Union and for favoring legislation against racial discrimination. The record in the present case contains the following colloquy between a member of the Regional Board and the present appellant: "MR. BLAIR: Did you ever write a letter to the Red Cross about the segregation of blood? MISS BAILEY: I do not recall. MR. BLAIR: What was your personal position about that? MISS BAILEY: Well, the medical—. MR. BLAIR: I am asking yours."[32]

No doubt some boards are quite aware that unconventional views and conduct have no tendency to indicate disloyalty. But the fact remains that some boards imagine the contrary. This fact is only too well known. It puts government employees under economic and social pressure to protect their jobs and reputations by expressing in words and conduct only the most orthodox opinions on political, economic, and social questions.

A regulation that restrains constitutionally protected speech along with other speech cannot be enforced against either. Legislation is unconstitutional as a whole if it "does not aim specifically at evils within the allowable area of state control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute . . . results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. . . . An accused . . . under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. . . . Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression."[33]

The Supreme Court has foreseen practically the case now before us. In holding a New York statute unconstitutional the Court said: "The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision

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[30] *Freedom vs. Security*, by Robert E. Cushman, Goldwin Smith Professor of Government in Cornell University; in PHYSICS TODAY, March 1949, pp. 14, 18.

[31] Editorial in The Washington Post, Feb. 6, 1949.

[32] Miss Bailey replied "I have no personal opinion."

[33] *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98.

as to free expression of political views in the light of a statute intended to punish subversive activities."[34]

Freedoms that may not be abridged by law may not be abridged by executive order. Executive power to control public employment stands on no higher constitutional ground than legislative power to tax. The taxing power does not extend to sales of propaganda not made for profit; license taxes, though imposed for the legitimate purpose of raising revenue, are unconstitutional in their application to such sales.[35] Such taxes, even if they are too small to be a "substantial clog"[36] on the circulation of propaganda, are "on their face . . . a restriction of the free exercise of those freedoms which are protected by the First Amendment."[37] The loss of employment, reputation, and earning power here involved is on its face a very substantial clog on the free exercise of those protected freedoms. It is therefore more clearly unconstitutional than the taxes.

Appellant's dismissal abridges not only freedom of speech but freedom of thought. Whatever loyalty means in the present connection, it is not speech but a state of mind. The appellant was dismissed for thinking prohibited thoughts. A constitution that forbids speech control does not permit thought control.

Appellant's dismissal attributes guilt by association, and thereby denies both the freedom of assembly guaranteed by the First Amendment and the due process of law guaranteed by the Fifth. The appellant was dismissed as disloyal because she was believed to be a member or associate of the Communist Party. Undoubtedly many such persons are disloyal in every sense to the government of the United States. But the Supreme Court has held that a particular member of the Communist Party may be "attached to the principles of the Constitution" within the meaning of those words in a naturalization act: "As Justice Holmes said, 'Surely it cannot show lack of attachment to the principles of the Constitution that . . . [one] thinks it can be improved. . . . If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate.'. . . Under our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."[38] As was said more recently, "To condemn or to interdict all members of a named political party is an abridgement of free

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[34] *Winters* v. *New York*, 333 U. S. 507, 518.

[35] *Jones* v. *City of Opelika*, 319 U. S. 103; *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105; *Busey* v. *District of Columbia*, 319 U. S. 579; *Busey* v. *District of Columbia*, 78 U. S. App. D. C. 189, 138 F. 2d 592.

[36] *Jones* v. *City of Opelika*, 316 U. S. 584, 604. The dissent of Chief Justice Stone and the other dissents filed at the same time were afterwards adopted as opinions of the Court. *Jones* v. *City of Opelika*, 319 U. S. 103, 104.

[37] *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105, 114.

[38] *Schneiderman* v. *United States*, 320 U. S. 118, 138, 136.

speech, press and assembly. The Communist Party in this country is recognized as a political party." [39]

The court thinks Miss Bailey's interest and the public interest conflict. I think they coincide. Since Miss Bailey's dismissal from a nonsensitive job has nothing to do with protecting the security of the United States, the government's right to preserve itself in the world as it is has nothing to do with this case. The ominous theory that the right of fair trial ends where defense of security begins is irrelevant.

On this record we have no sufficient reason to doubt Miss Bailey's patriotism, or that her ability and experience were valuable to the government. We have no reason to suppose that an unpatriotic person in her job could do substantial harm of any kind. Whatever her actual thoughts may have been, to oust her as disloyal without trial is to pay too much for protection against any harm that could possibly be done in such a job. The cost is too great in morale and efficiency of government workers, in appeal of government employment to independent and inquiring minds, and in public confidence in democracy. But even if such dismissals strengthened the government instead of weakening it, they would still cost too much in constitutional rights. We cannot preserve our liberties by sacrificing them.

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[39] Prettyman, Circuit Judge, dissenting, in *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146, 177, 178. The Supreme Court affirmed the decision of the court on other grounds, saying: "We do not find it necessary to reach or consider the validity of § 9(h)" of the National Labor Relations Act as amended, which requires non-Communist affidavits. *National Maritime Union of America* v. *Herzog*, 334 U. S. 854-855.

APPENDIX.

EXECUTIVE ORDER NO. 9835, 12 F. R. 1935.

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I

INVESTIGATION OF APPLICANTS

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon ac-

tual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

a. Federal Bureau of Investigation files.

b. Civil Service Commission files.

c. Military and naval intelligence files.

d. The files of any other appropriate government investigative or intelligence agency.

e. House Committee on un-American Activities files.

f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.

g. Schools and colleges attended by applicant.

h. Former employers of applicant.

i. References given by applicant.

j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

Part II

Investigation of Employees

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency or to such person

or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

Part III

Responsibilities of Civil Service Commission

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

Part IV

Security Measures in Investigations

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement, however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not

be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

Part V

Standards

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI

MISCELLANEOUS

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN.

THE WHITE HOUSE.
MARCH 21, 1947.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 766

DOROTHY BAILEY, PETITIONER

v.

SETH W. RICHARDSON, ET AL.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Columbia (R. 107) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 114) is not yet reported.

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[1] Respondents are the Administrator of the Federal Security Agency, the Secretary of Labor, members of the Civil Service Commission, members of a panel of its Loyalty Review Board, and members of a panel of its Fourth Regional Loyalty Board.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1950 (R. 147). The petition for a writ of certiorari was filed on April 19, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Although the petition (pp. 2-3) seeks to raise several questions, we believe that the following question is dispositive of the case:

Whether a person conditionally reinstated subject to investigation by the Civil Service Commission as to her qualifications for Government employment, who is not in the classified Civil Service during the period of such investigation, is entitled to judicial relief after the Commission has determined that she is not qualified for employment because of reasonable doubt as to her loyalty to the United States.

EXECUTIVE ORDER INVOLVED

Executive Order 9835, 12 F. R. 1935, is set out in full at pp. 30-36 of the appendix to the petition for certiorari.

STATEMENT

Petitioner was employed in the classified Civil Service of the United States from August 19, 1939, to June 28, 1947 (R. 4, 17, 70),[2] when, due to a re-

[2] Petitioner was given a classified status on May 28, 1940, effective as of August 19, 1939 (R. 4, 17, 70).

duction in force, she was separated from the service (R. 4, 70, 92). On March 25, 1948, she was given a temporary appointment, and on May 28, 1948, she was reinstated (R. 4, 18-19, 71), but only conditionally.

The regulations of the Civil Service Commission issued under Executive Order 9830, 3 C.F.R. 108 (1947 Supp.), and in effect at the time of petitioner's reinstatement, made her reinstatement subject to the condition that removal might be ordered by the Commission if an investigation made within eighteen months disclosed disqualification for Federal employment. 5 C.F.R. § 2.112 (1949 ed.).[3] *Inter alia,* an individual is deemed disqualified if "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to

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[3] The petition (p. 3) characterizes the appointment as "permanent"; but the Regulation shows that it was conditional. Section 2.112 of 5 C.F.R., (1949 ed.) states:

"(a) In the following types of appointments investigation designed to further establish the individual's qualifications may be made at any time within eighteen months of the personnel action and removal may be ordered by the Commission if such investigation discloses that the individual is disqualified for Federal employment, and all such appointments shall be considered as subject to this condition:

(1) Original probational.
(2) Reappointments.
(3) Reinstatements.

* * * * *

"(b) The condition "subject to investigation" shall expire automatically at the end of eighteen months from the effective date of the personnel action, except in a case in which the Commission has not made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal. * * *"

the Government of the United States" (5 C.F.R. § 2.104(7) (1949 ed.))—the standard established by Executive Order 9835, 12 F. R. 1935. During the period of her conditional reinstatement, petitioner was not in the classified Civil Service (R. 55-59, 108-109, 119-122).

An investigation of petitioner was accordingly instituted, and on July 28, 1948, the Fourth Regional Loyalty Board of the Commission sent petitioner an interrogatory to be answered under affirmation or oath within ten days after receipt, and advised her that she had the right, upon request, to a hearing before that Board. The interrogatory stated in part (R. 19-25):

> The Commission has received information to the effect that you are or have been a member of the Communist Party or the Communist Political Association; that you have attended meetings of the Communist Party, and have associated on numerous occasions with known Communist Party members.
>
> * * * * *
>
> The Commission has received information to the effect that you are or have been a member of the American League for Peace and Democracy, an organization which has been declared by the Attorney General to come within the purview of Executive Order 9835.
>
> * * * * *
>
> The Commission has received information to the effect that you are or have been a member

> of the Washington Committee for Democratic Action, an organization which has been declared by the Attorney General to come within the purview of Executive Order 9835.

Petitioner answered the interrogatories under oath, admitting past membership in the American League for Peace and Democracy but specifically denying all other charges, and requested a hearing.

Pursuant to petitioner's request, a hearing before a panel of the Fourth Regional Loyalty Board was held on September 13, 1948 (R. 5, 60). At the hearing, petitioner was represented by counsel of her choice and testified personally. All affidavits offered by her were accepted, and all witnesses presented by her testified. Petitioner was specifically questioned with reference to the charges contained in the interrogatory, but the identity of the informants against her was not revealed. (R. 60, 127, LB.)[4]

On November 1, 1948, the Regional Board notified petitioner and her employer, the Federal Security Agency, that, on all the evidence, reasonable grounds exist for belief that she is disloyal. Petitioner was informed of her right to appeal to the Loyalty Review Board of the Commission, and the Federal Security Agency was instructed to suspend petitioner pending an appeal. (R. 26-27.)

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[4] The transcripts of hearings before the Regional Loyalty Board and the Loyalty Review Board, which are furnished to the court in mimeographed form, shall be referred to hereafter as LB and LRB respectively.

At petitioner's request, a hearing was held by a panel of the Loyalty Review Board on December 8, 1948 (R. 9, 61). At this hearing, the transcript of the hearing before the Regional Board was introduced, petitioner again testified, was represented by counsel of her choice, and submitted additional affidavits in her behalf (R. 61, LRB).

On February 9, 1949, petitioner was informed by the Review Board that the decision of the Regional Board was affirmed. On the same day, notice to that effect was sent to the Federal Security Agency and the Agency was requested to remove petitioner's name from its rolls. (R. 63-65.) Accordingly, on February 11, 1949, petitioner was removed from her employment (R. 30-31). Thereafter, petitioner requested review of the panel's decision by the full Review Board, and on March 18, 1949, the Board declined to review its prior decision (R. 65-67).

On February 17, 1949, petitioner, in a letter to respondent Ewing, Administrator, Federal Security Agency, contended for the first time that she was in the classified Civil Service and that her removal could be effected only under the Lloyd-LaFollette Act (Act of August 24, 1912, 37 Stat. 555, 5 U.S.C. 652), *i.e.*, that the employment agency must make its own independent determination of disqualification (R. 95-96). Upon being advised by the Federal Security Agency that she had been lawfully removed (R. 97-98, 101-104), petitioner

instituted the present action against respondents, individually and in their official capacities, for a declaratory judgment that she had been improperly removed, for an order directing her reinstatement, and for incidental injunctive relief (R. 2-16). Petitioner contended: (1) that her removal was not effected in accordance with the terms of the Lloyd-LaFollette Act, *supra;* (2) that her removal did not comply with Executive Order 9835; and (3) that her removal was in contravention of her constitutional rights.

Petitioner's motion for an injunction *pendente lite* compelling her reinstatement (R. 31-32) was denied (R. 67-68). After respondents answered (R. 69-91), both sides moved for summary judgment and filed supporting affidavits (R. 104, 107). The District Court granted respondents' motion for summary judgment, ruling against petitioner on all three grounds. On appeal, the court below, Judge Edgerton dissenting, affirmed the judgment of the District Court.[5] After holding that the Lloyd-LaFollette Act, *supra,* was not applicable to

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[5] In part, the judgment below was reversed and remanded with instructions to enter a decree holding invalid that portion of the orders of respondents which barred petitioner from Federal employment for three years (R. 122, 136). The court stated that this proscription of employment was not pursuant to a general regulation. "* * * A general order that no person who is denied permanent employment after a conditional appointment be reemployed for three years might well be valid. The bar in the present proceeding appears on the record to be imposed by the Board upon this particular individual as a matter of individual adjudication. * * *" (R. 122). On April 20, 1950, the Civil Service Commission added

petitioner's conditional reappointment, and that the procedure followed by the Loyalty Boards conformed to the requirements of Executive Order 9835 and the Constitution, the court below stated (R. 135):

> We conclude that the Executive Order before us and the proceedings under it violated no congressional limitation upon the executive power of removal; that no constitutional right was involved in this non-appointment or dismissal; and that, in so far as the circumstances imposed hardship upon the individual, the exigencies of government in the public interest under current conditions must prevail, as they always must when a similar clash arises.

ARGUMENT

The majority opinion (R. 114-136) by Judge Prettyman in the court below decisively answers all contentions which petitioner raises, and we respectfully submit that no aspect of the case needs further review. Here, the petition focuses primary attention on a claimed infringement of petitioner's civil liberties. However, the action which

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to Part 5 of its rules, § 5.101(a) which provides (15 F.R. 2239): "Persons disqualified for any of the reasons stated under Civil Service Rule II, § 2.104(a)(1) through (8) of this chapter, may, in the discretion of the Commission, be denied examination, or be denied any of the types of appointment listed in Civil Service Rule II, § 2.112(a)(1) through (6), namely, original probational, reappointment, reinstatement, temporary appointment, interagency transfer, and conversion from excepted, war service indefinite or temporary indefinite appointment to competitive appointment, for a period of not more than three years from the date of the determination of such disqualification."

petitioner has brought is basically simple in character, and its disposition is controlled by familiar principles which make it unnecessary to reach the broad contentions thus made. Petitioner, a conditional reappointee who is not in the classified Civil Service,[6] seeks a declaratory judgment that she was illegally discharged and an order directing her reappointment. Her contention is and must be that the determination of the Civil Service Commission of disqualification for Federal employment is subject to judicial review. On this crucial issue, we submit that a decision of this character by the Civil Service Commission is without the scope of judicial power. It is settled law that the courts will not review the acts of executive officials performed within the scope of executive authority, nor will the courts substitute their judgment for that of the officials.[7]

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[6] Although petitioner contended below that her dismissal was in violation of the Lloyd-LaFollette Act, 5 U.S.C. 652, the petition herein does not urge as error the ruling of both courts below that petitioner was not in the classified Civil Service within the meaning of that Act.

[7] *Decatur* v. *Paulding*, 14 Pet. 497, 515; *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *Carrick* v. *Lamar*, 116 U.S. 423, 426; *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 324; *West* v. *Hitchcock*, 205 U.S. 80, 85; *Ness* v. *Fisher*, 223 U.S. 683, 691-692; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U.S. 549, 555; *Hall* v. *Payne*, 254 U.S. 343, 347; *Work* v. *Rives*, 267 U.S. 175, 183; *Wilbur* v. *United States*, 281 U.S. 206, 218; *I. C. C.* v. *New York, N. H. & H. R. Co.*, 287 U.S. 178, 203; *United States ex rel. Chicago Gt. Western R. R.* v. *I. C. C.*, 294 U.S. 50, 62; *United States ex rel. Girard Co.* v. *Helvering*, 301 U.S. 540, 543; *Adams* v. *Nagle*, 303 U.S. 532, 542; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 131-132; *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C.A. D.C.), certiorari denied, 339 U.S. 904.

This principle of non-intervention in the internal administration of the executive branch of the Government has been uniformly applied in the field of personnel administration. "The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefor it is one of those acts over which the courts have no general supervising power." *Keim* v. *United States,* 177 U. S. 290, 293. And see *Eberlein* v. *United States,* 257 U. S. 82; *White* v. *Berry,* 171 U. S. 366; *Friedman* v. *Schwellenbach,* 159 F. 2d 22, certiorari denied, 330 U. S. 838; *Maghan* v. *Board of Comm'rs of the District of Columbia,* 141 F. 2d 274 (C.A. D.C.); *Hammond* v. *Hull,* 131 F. 2d 23 (C.A. D.C.), certiorari denied, 318 U. S. 777; *Love* v. *United States,* 108 F. 2d 43 (C.A. 8), certiorari denied, 309 U. S. 673; *Levine* v. *Farley,* 107 F. 2d 186 (C.A. D.C.), certiorari denied, 308 U. S. 622; *United States ex rel. Taylor* v. *Taft,* 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *Gadsden* v. *United States,* 111 C. Cls. 487; *Weinstein* v. *United States,* 109 C. Cls. 579; *Culligan* v. *United States,* 107 C. Cls. 222, certiorari denied, 330 U. S. 848; *Bratton* v. *United States,* 90 C. Cls. 604; *Bennett* v. *United States,* 89 C. Cls. 322; *Golding* v. *United States,* 78 C. Cls. 682, certiorari denied, 292 U. S. 643; *Kellom* v. *United States,* 55 C. Cls. 174; *Lellmann* v. *United*

States, 37 C. Cls. 128; *Waterman* v. *Somervell*, 34 F. Supp. 695 (S.D. N.Y.), certiorari to C.A. 2 denied, 317 U. S. 630; *Block* v. *Sassaman*, 26 F. Supp. 105 (D. Minn.); *Page* v. *Moffett*, 85 Fed. 38 (C.C. D.N.J.). The same principle applies to removals. Indeed the *Keim, Eberlein* and *White* cases were concerned with discharges, and held them nonreviewable.

The courts have intervened only to enforce compliance with specific procedural requirements (*United States* v. *Wickersham*, 201 U. S. 390; *United States* v. *Elchibegoff*, 106 C. Cls. 541, certiorari granted, 329 U. S. 704, writ dismissed, 329 U. S. 694), but not otherwise. Here no statutory right of petitioner was violated.[8]

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[8] Both courts below also found (R. 109-111, 118-119) compliance with the procedural requirements of Executive Order 9835. In contending that the procedure followed by the Loyalty Boards does not conform to the requirements of the Order, petitioner points to Part V of the Order which provides that the standard for the refusal of employment shall be that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States," and asserts that "evidence" is used in its jurisprudential sense and does not include information secretly disclosed to the Loyalty Boards. The question thus raised is simply one of Presidential intention. We submit that the Order, read as a whole, demonstrates conclusively and emphatically that "evidence" means merely all the information available to the Loyalty Boards. Part I(3) of the Order provides that investigations of applicants shall be made at all available sources of information, including files of the Federal Bureau of Investigation, files of any other appropriate Government investigatory or intelligence agency, and files of the House Committee on Un-American Activities. Part IV requires that the names of confidential informants not be revealed; Part II (2b) states that the nature of charges shall be set forth as specifically as security considerations permit. Moreover on March 13, 1948, the President, by Direc-

Under the rule established by the above cases, the action of the Civil Service Commission herein is not subject to judicial review. The rule has particular application to the instant case. Here petitioner, as both courts below held (R. 108, 119-122), was not in the classified Civil Service. She was given a conditional reinstatement expressly made subject to investigation, and was in no better position, therefore, than any outsider who applies for employment with the United States Government. In such circumstances, the right of the executive branch of the Government to refuse to employ petitioner if in its opinion she did not have the requisite qualifications would seem clear. As the court below observed (R. 123): "* * * If her status was merely that of an applicant for appointment, as we think it was, her non-appointment involved no procedural constitutional rights. Obviously, an applicant for office has no constitutional right to a hearing or a specification of the reasons why he is not appointed. * * *" It is submitted therefore that the court below was clearly correct in holding that it was not within its province to interfere with the Civil Service Commission in its refusal to approve petitioner for Government employment.

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tive, unequivocally directed that all reports, records and files relating to the loyalty program be preserved in strict confidence. 13 F. R. 1359. As the court below cogently observed (R. 119), "If the Loyalty Boards were violating the President's instructions in so crucial a part of a program so widely publicized, he would surely have known it and would have corrected the error."

Friedman v. *Schwellenbach*, 159 F. 2d 22 (C.A. D.C.), certiorari denied, 330 U. S. 838, involved an almost identical situation.

Although as stated, we think petitioner's position no different from that of a person seeking employment, the above authorities establish that the same rule would govern removals from office. In the latter case, as well as in the former, the executive action is not reviewable, and the employee has no right to a hearing in the judicial sense.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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